- **1(B) MEETING: COUNSEL'S E-MAIL SURVEY OF MEMBERS ABOUT HOW THEY HAD VOTED IN A MATTER, NOT A MEETING**

- **6(B) MINUTES: WHEN ADOPTION IS DELAYED BECAUSE MEMBERS DISAGREE ABOUT ONE ITEM, ADVISEABLE TO PROMPTLY ADOPT A SET FOR LATER AMENDMENT**

***Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at** http://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Topical_Index.pdf

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August 20, 2015

Re: Mayor and Common Council of the Town of University Park
Judd O. Nelson and fourteen others, Complainants

Judd O. Nelson and fourteen others ("Complainants") allege that the Mayor and Common Council of the Town of University Park ("Council") violated the Open Meetings Act by deciding through an exchange of emails to change an action that the Council had taken during its November 3, 2014 open session. Complainants also allege that the Council did not adopt the minutes of the open session in a timely manner. The Council responded that no vote was taken by email, that the email exchanges did not constitute a "meeting" subject to the Act because a quorum was not deliberating at one time, and that the minutes were adopted in a timely fashion. The Complainants replied with a review of the Council's earlier meetings practices.[1]

Facts

Complainants and the Council have provided us with minutes and draft minutes of the November 3, 2014 session, emails among the Town Attorney and the Council members after that session, transcripts of three

[1] Generally, new subjects should be raised in a new complaint, to which the public body must then respond within 30 days, rather than in a reply, to which a public body must submit any response within one week. As it was unclear whether the Complainants intended their submission to be an entirely new complaint, or, instead, background information for this one, our staff asked the Complainant who had transmitted it how they wished us to treat it. Without an answer to that question, staff asked the Council to respond only to the matter that was raised in the complaint, and we will assume that Complainants want us to focus on the Council's recent practices.

open sessions, and documents pertaining to the land use matter under discussion. The submissions show that on November 3, the Council was discussing what position to take before the county planning board with respect to the number and types of signs that a developer should be permitted to install on the street side of three parcels under development. If the Council wished to comment to the county planning board on the matter, it needed to do so by November 6. The signage question was confused by several circumstances: the developer would need two types of permission from the county planning board, one as to the number of signs potentially allowable and the other as to the design and other specifications of signs that the developer currently wished to install; a Town committee had made recommendations that did not distinguish between the two types of application; and the neighboring town of Riverdale Park had adopted a position that the Council generally wished to support.

For our purposes, it suffices to say that the Council's discussion of the signage issue resulted in a 7-0 vote to adopt a motion that, when studied the next day, was discovered to leave unclear what position the Council wished the mayor to convey on one of the applications. By email, the Town Attorney posed to the Council members a precise question as to what each thought the motion had meant. Five members replied within the space of slightly over four hours. Two of the five responded within six minutes of each other; one of them later explained that he had sent the message while he was participating in a conference call at work, apparently with people who were not Council members. A sixth member responded by email the next day, and the seventh telephoned the mayor the next day. When all was said and done, four members had reported that they had thought one thing; three had thought another.

The mayor's comments to the planning board reflected the lack of unanimity on the vote. Meanwhile, one of the Complainants had attended the Council's meeting and had observed the vote taken there. Her comments to the planning board reflected her understanding that the Council had voted unanimously, 7- 0, to adopt the Town committee's recommendations. Her understanding of the effect of the Council vote differed from the understanding of four of the Council members.

The ambiguity of the motion and the Council members' subsequent interpretations of it led to a delay in the adoption of minutes. The Council considered the minutes two weeks later, at its next regularly-scheduled meeting, and decided that revisions were needed. The Council again discussed the minutes at its December 1 meeting. At that meeting, the Council decided that the Town Attorney should revise and complete the minutes to account for a concern raised by a resident, a complainant here, who was concerned that her comments at the November 3rd Council meeting had not been described accurately. The Council agreed to address in the

future the general question of how much detail about public comments to include in Council minutes. On December 15, after discussion, the Council approved the minutes. The minutes included a note to the effect that, "[d]ue to some confusion during the vote," the Council members were asked by email on November 4 to clarify their votes and did so, and that the minutes reflected the clarification.

Discussion

A. Whether the Council's email communications to the Town Attorney on November 4 violated the Act

The Complainants allege that the Council violated the Act by deliberating and making decisions "outside of an open meeting." They state that those "non-public communications and action resulted in altering a position previously voted on an amended motion in an open public meeting . . . ." The Complainants further state that, had clarification been needed, "the debate could have continued at the Council Meeting on November 3, 2014 since the meeting itself continued for another hour," or that a special session could have been called, or that a meeting could have been held by teleconference.

The Act requires a public body to hold its meetings in open session, unless the Act expressly permits otherwise. Annotated Code of Maryland, General Provisions Article ("GP") § 3-301. As explained in 81 *Opinions of the Attorney General* 140,142 (1996), the Act establishes the rules that apply when a quorum of members is present for the conduct of public business but does not preclude public bodies from addressing public business through methods other than meetings. A requirement that a public body only address public business at a meeting, the opinion explains, "would derive from the particular law establishing the agency and delineating its procedures, not from the Open Meetings Act." *Id*. Thus, while other laws might regulate a public body's method of considering and taking actions—for example, a town's charter or a board's bylaws might address the issue—the Act does not. So, if the Council did not "meet," as that term is defined by the Act, when its members exchanged emails about the November 3 vote, then the Act did not apply. If the Act did not apply, the allegations do not fall within our purview, as our authority extends only to complaints that the Act has been violated. § 3-204.

As defined by the Act, a "meeting" occurs when a "quorum" of the public body "convene[s]" to consider or transact public business. *See* § 3-101(g).[2] A quorum is a "majority of the members," unless otherwise provided

[2] § 3-101(g) provides: "'Meet' means to convene a quorum to consider or transact public business."

by law. § 3-101(k). The word "convene," as long interpreted by the Compliance Board, entails the simultaneous presence of a quorum of the public body's members, whether in person or by telephone, and ordinarily does not include sequential written communications when the members are apart. *See, e.g.* 8 *OMCB Opinions* 103, 105 (2012) (applying the definition of "meeting" to find that the Act did not apply to county commissioners' consideration of a circulated form on separate dates). Further, the quorum must "consider or transact public business." A quorum that has gathered by happenstance thus will not be deemed to have met unless the members use the occasion to interact on public business. To underscore that point, the Act expressly "does not apply to: . . . a chance encounter, a social gathering, or any other occasion that is not intended to circumvent [the Act]." § 3-103(a)(2).[3]

These principles are not easy to apply to electronic communications among a quorum. For example, has a quorum "convened" if enough members, though in separate locations, are all watching their email accounts at the same time? In that example, without evidence of near-simultaneous interaction among the quorum on public business, we doubt that the definition of the word "convene" can be stretched so far. In another example, has a quorum convened if the members, from separate locations, are all watching their email accounts at the same time and communicating with each other on public business at that time? In that case, we think that the members could fairly be deemed to have "convened," just as they would be if they had met by teleconference.[4] Much depends, we think, on whether the members have reason to believe that a quorum is in on the discussion.

Our opinions on sequential written communications have often been informed by an opinion of the Attorney General issued in 1996, before smartphones were widely used, that three members of a public body had not convened when they exchanged emails over the course of two days. *See* 81

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[3] As explained in an earlier opinion, the § 3-103(a)(2) exclusion "does not confer on a public body a blanket permission to discuss public business at such gatherings. Instead, the exclusion evaporates, and the Act applies, when an event that begins as a chance encounter or social gathering is then used to convey information that constitutes public business within the Act." 7 *OMCB Opinions* 269, 270 (2011) (citing 3 *OMCB Opinions* 30,34 (2001) (finding that the Act applied when public business within the Act was conducted by an "accidental quorum" created by a member's unexpected appearance); 3 *OMCB Opinions* 78, 83 (2001) (finding that the Act applied to a social gathering where a nonvoting member told the members how he would present an agenda item at the board's meeting later that evening); 2 *OMCB Opinions* 74, 76 (1999) (cautioning that a public body meeting socially "must refrain from conducting public business during that time").

[4] *See Tuzeer v. Yim*, 201 Md. App. 443, 468-71 (2011) (treating presence of one member by telephone as the member's presence for purposes of the Act).

Opinions of the Attorney General 140 (1996). On the facts given there, each member "opened the electronic folder containing his or her e-mail at a convenient time, much as the member would open an envelope containing writings." The Attorney General then explained that "the result would be different" had the members been "able to use e-mail for 'real time' simultaneous interchange." In that case, the opinion states, "the analogy would be to a telephone call, the hallmark of which is the capacity for immediate group interaction and which can constitute a 'meeting' under the [Act]." *Id*. at 143-44. We agree with that result for telephone calls because, in the case of deliberately-placed telephone calls, members are likely to be aware of the "capacity for immediate group interaction" among a quorum. In the context of electronic media, however, we think that something more is needed for a meeting than the mere "capacity" for immediate group interaction; in our view, there should also be some level of awareness that a quorum is present for a specific period of time.

The facts here, as we take them from the submissions, do not match either of our hypotheticals concerning a member's receipt of emails. They also do not lend themselves to an analogy either to a telephone call or written correspondence. The presence of four members of this seven-member council creates a quorum. On November 4, four members responded by a "reply all" email to the question that the Town Attorney had posed to all members at 1:35. The first member responded at 1:40 p.m.; the second, fourteen minutes later; the third, six minutes after that, while he was participating in a conference call, apparently with people who were not members; and the fourth, at 5:43 p.m. As far as we can tell, no member replied to any other member's message, and no one sent a follow-up message to the others that day. We cannot tell from the messages whether any member read the other members' response, let alone during that time period, or even whether four members were online at the same time. So, although the capacity for simultaneous interaction among a quorum might have been there, the timing and content of these emails do not establish that a quorum of the Council "met" that afternoon to consider public business. We conclude that the Act did not apply and therefore was not violated.

We caution that this already-close question would have been much closer had the emails reflected actual interaction among the group on how to act on an issue and had the emails occurred within a shorter period of time.[5]

[5] The use of sequential electronic communications among a quorum, when used to consider public business, is prohibited under some other states' open meetings laws. *See, e.g*. Del. Op. Att'y Gen. 03-IB11 (2003)("[W]e hold that a quorum of a public body using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction, or advisory power violates the Open Meeting Law."); *Del Papa v. Bd. of Regents of the Univ. and Community College Sys. of Nev.,* 114 Nev. 388, 400, 956 P.2d 770, 778 (1998) (holding that serial electronic communications

And, although the Act did not apply to this discussion, the appearance that business was being conducted secretly did not serve the purpose of the Act to "increase[] the faith of the public in government." § 3-102(b). See 2 *OMCB Opinions* 49, 50 (1999) (finding that Act did not apply to voting by separate telephone calls; recognizing "that this way of proceeding deprives the public of an opportunity to observe the real decision-making process").

We have two suggestions for avoiding the suspicion that public business is being conducted secretly by electronic communication, and we direct the Council also to some useful guidance given by the Wisconsin Attorney General to public officials in that state. Our first suggestion is that members of public bodies simply forebear from conducting business electronically because of the ease with which a conversation between two members (when a quorum is four) may be transmitted to the others and thereby effect an impermissible "crystallization of secret decisions to a point just short of ceremonial acceptance.'" *City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980) (citation and internal quotation marks omitted). Our second suggestion, applicable if a member does communicate electronically with another member, is that the member should be just as aware of the potential for the formation of a quorum as that member would be if he or she were to encounter other members by chance. Particularly risky is the use of the "reply all" and "forward" functions when the addressees form a quorum.

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used to deliberate toward a decision violated open meetings law and "if a quorum is present, or is gathered by serial electronic communications, the body must deliberate and actually vote on the matter at a public meeting"); cf. *Stockton Newspapers, Inc. v. Members of the Redev. Agency of Stockton*, 171 Cal.App.3d 95, 98, 214 Cal.Rptr. 561, 562 (1985) ("a series of telephone contacts does constitute a meeting within" California's public meeting law).

Courts in other states have reached the same results in cases involving serial in-person discussions among small groups of a public body's members. See, e.g., *Jones v. Tanzler*, 238 So.2d 91, 93 (Fla.1970) ("the statute should not be circumvented by ... small individual gatherings wherein public officials ... may reach decisions in private on matters which may foreseeably affect the public"); *Right to Know Comm. v. City Council, City & Cnty. of Honolulu*, 117 Haw. 1, 12-13, 175 P.3d 111, 122-23 (Ct. App. 2007), *as corrected* (Feb. 15, 2008) (gathering cases in which courts have found that a public body violated a state's open meeting law when, instead of meeting publicly to discuss a matter, groups of less than a quorum serially communicated, electronically or otherwise, in such a way that a decision was reached before the public meeting); *see also* La. Att'y Gen. Op. No. 12-0177 (Oct. 11, 2012) ("A "rolling quorum" or a ""walking quorum" refers to a device used to circumvent the Open Meetings Law so as to allow a quorum of a public body to discuss an issue through the use of multiple discussions of less than a quorum. Such a device is not permissible under the Open Meetings Law.").

In 2005, the Wisconsin Attorney General explained the "special dangers" inherent in electronic message technologies and articulated factors that would be useful in determining whether a series of emails among a quorum constitute a meeting. She stated:

> The widespread use of electronic mail and other electronic message technologies creates special dangers for governmental officials trying to comply with the open meetings law. Although two members of a governmental body larger than four members may discuss the body's business without violating the open meetings law, features like 'forward' and 'reply to all' common in electronic mail programs deprive a sender of control over the number and identity of the recipients who eventually may have access to the sender's message. Moreover, because of electronic mail communication, it is quite possible that a quorum of a governmental body may receive the sender's message — and therefore may receive information on a subject within the body's jurisdiction — in an almost real-time basis, the way they would receive it in a meeting of the body. Although no Wisconsin court has applied the open meetings law to electronic mail communications, it is likely that the courts will try to determine whether electronic communication is more like written correspondence which does not raise open meetings law concerns, or more like conversation, which does raise those concerns. Courts are likely to consider the following factors: (1) the number of participants involved in the communication; (2) the number of communications regarding the subject; (3) a time frame within which the electronic communications occurred; and (4) the extent of the conversation-like interactions reflected in the communications.

2005 Wisc. AG LEXIS 29, 2-4 (Wisc. AG 2005), quoting *Wisconsin Open Meetings law: A Compliance Guide* (2010)(quotation marks omitted).[6] The Wisconsin Attorney General then gave this practical advice on how to avoid violating the law:

> Inadvertent violations of the open meetings law through the use of electronic communications can be reduced if electronic mail is used principally to transmit information one-way to a body's membership; if the originator of the message reminds recipients to reply only to the originator, if at all; and

[6] The current edition of Wisconsin's guide is posted at http://www.doj.state.wi.us/sites/default/files/dls/open-meetings-law-compliance-guide-2010.pdf.

> if message recipients are scrupulous about minimizing the content and distribution of their replies.

Id.

In sum, we encourage members of public bodies to consider carefully the ways in which they communicate among themselves electronically. To underscore the Wisconsin Attorney General's point, electronic message technologies create "special dangers for governmental officials trying to comply with the open meetings law."

B. Whether the Council adopted the minutes of its November 3 in a timely manner

Complainants allege that the Council violated the Act by failing to adopt the minutes of the November 3 meeting until December 15. For public bodies that adopt minutes in the written form, the Act requires that, "as soon as practicable after a public body meets, it shall have written minutes of its session prepared." § 3-306(b).

The Compliance Board has often addressed allegations that the public body has violated § 3-306(b). The usual problems have been a delay in the preparation of a draft or a long interval between meetings and therefore a delay in voting to adopt the draft. *See*, *e.g.*, 6 *OMCB Opinions* 161 (2009); 8 *OMCB Opinions* 176, 177 (2013). Neither problem arose here; a draft was prepared promptly, and the Council addressed it promptly. The problem instead was that the Council could not agree on a draft. Given the Council's substantive discussions on what to include in the minutes, we can hardly say that it would have been "practicable" for the Council to agree sooner. The material in the Complainants' reply about earlier delays in the issuance of minutes does not address these particular circumstances.

We find that the Council did not violate § 3-306(b). We suggest, however, that there is a way to accommodate both the public body's need to get the minutes right and the public's need to have reasonably prompt access to the minutes of a meeting: when revisions to the language on an agenda item are needed, the public body may immediately adopt minutes that reflect information on the other items and that inform the public that amendments are forthcoming. The amendments, as with the minutes, must be adopted "as soon as practicable."

Conclusion

We find that the Council did not violate the Act as there was no meeting within the meaning of the Act. We have given cautionary advice on the risks inherent in the exchange of email among a quorum of a public body,

and we have suggested a way in which a public body may adopt minutes promptly when its members disagree on parts of the draft presented to it.

Open Meetings Compliance Board

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